No. 380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY TO MOTION TO DISMISS

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Counsel for Appellant

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(1) Re: Appellee's argument that the appeal does not present substantial questions.

The Appellee states at Page 2, that the question of constitutionality of the statute was presented to this Court in the City of New Rochelle and the Lynbrook Gardens cases, and that certiorari was denied in each case. Of course, the denial of certiorari does not indicate that this Court either considered or passed upon the constitutional questions (*United States* v. *Carver*, 260 U. S. 482). In any event, the precise question presented by the instant record has never been presented nor passed upon by this Court.

The Appellee, in its argument under this caption, now seeks to create the impression or suggestion that the taxpayer may not have been incompetent after all.

It now claims that that was a matter "for determination by a competent physician".

That the taxpayer's incompetency was known to the taxing officers and officials of the Town specifically was alleged at folio 31, and is undisputed in the certified Record. The Appellee in the lower courts did not submit anything to put this in issue. Indeed, it could not. It ill befits the Town at this stage of the proceedings, to venture the suggestion that this might have been an issue in the lower court.

(2) Re: Appellee's argument that the judgment rests upon an adequate non-federal basis.

Appellee contends that Appellant should not have proceeded by motion in the In Rem proceeding, but should have instituted a separate or plenary action and filed a lis pendens as suggested by the County Court in its opinion (Jurisdictional Statement, Page 14). Since the Committee still had time within which to comply but failed and refused to proceed in the manner suggested, Appellee contends that the judgment rests on an adequate non-federal basis.

That this contention is erroneous is illustrated by the following chronology:

The opinion and decision of the County Court appeared on December 3, 1953. On February 1, 1954, the Appellate Division in *Nelson et al.* v. *City of N. Y.*, 283 App. Div. 722, 127 N. Y. S. (2) 854, directly disapproved of and rejected the separate or plenary action suggestion. It relegated the taxpayers to a motion in the In Rem proceeding to open their default and to take such proceedings therein as to enforce whatever rights and remedies they may have.

(See Appendix F.) It is precisely what had been done previously by the Appellant in the case at bar.

It was that same appellate court which on April 12, 1954 passed on the appeal from the County Court in the case at bar. Neither the prevailing nor dissenting opinion made mention of the separate action suggestion. It is reasonable to assume that that court found it unnecessary to do so in view of its memorandum decision in *Nelson et al.* v. *City of N. Y.* (supra), published but two and one-half months previously.

Parenthetically, the taxpayers in the *Nelson* case then moved in the In Rem proceeding to open their default, etc. That motion was denied in the lower courts and affirmed by the New York Court of Appeals in *City of N. Y.* v. *Nelson,* 309 N. Y. 94 (Jurisdictional Statement, Page 10). We have been informed by the taxpayers' attorneys in that case that an appeal is being taken to this Court. There, too, the validity of the taxing statute was attacked as being repugnant to the provisions of the Fourteenth Amendment.

(3) The other matters and points raised in Appellee's motion to dismiss are covered in our Jurisdictional Statement.

Respectfully submitted,

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APPENDIX F

Nelson, et al. v. *City of New York*
283 App. Div. 722
127 N. Y. S. (2) 854 (2nd case)

Supreme Court, Appellate Division, Second Department. Feb. 1, 1954. William P. Jones, New York City, for appellants. Meyer Scheps, New York City, for respondent. In an action pursuant to article 15, Real Property Law and for other relief with respect to two parcels of property located respectively in Kings and Queens Counties, title to which has been acquired by defendant through in rem foreclosures, plaintiffs, former owners, appeal from a judgment entered on an order granting defendant's motion for judgment on the pleadings and for summary judgment. Judgment unanimously affirmed, without costs, and without prejudice to plaintiffs taking such proceedings as they may be advised with respect to moving in the foreclosure action to open their default and with respect to enforcing in that action whatever rights or remedies plaintiffs may have. No opinion.